

A. Licensing and Regulation of Radio Communications Services and Antenna Structures

5. The Commission was created to regulate communications by wire and radio in the United States. *See* 47 U.S.C. 151. Section 1 of the Communications Act, as amended (Act), requires the Commission to regulate commerce in communications to “make available, so far as possible, to all people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities * * *.” 47 U.S.C. 151. When Congress amended the Communications Act in the Omnibus Budget Reconciliation Act of 1993, it directed “the development and rapid deployment of new technologies, products, and services for the benefit of the public * * * [and] efficient and intensive use of the electromagnetic spectrum.” *See id.* § 309(j)(3)(A), (D). The Telecommunications Act of 1996 was intended “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunication consumers and encourage the rapid deployment of new telecommunications technologies.” Congress also has provided that all television broadcasting in the United States will be by digital technology by the end of the transition to digital television (DTV) on December 31, 2006. *See* 47 U.S.C. 309(j)(14)(A)–(B). In addition, the Commission is authorized to assign frequencies to classes of stations, and has designated spectrum for public safety use. The Wireless Communications and Public Safety Act of 1999 (911 Act) directs the Commission to make 911 the universal emergency number for wireless and wireline telephone service and, among other matters, to encourage and support the development of comprehensive emergency communications throughout the United States so that all jurisdictions offer seamless networks for prompt emergency service.

6. As part of its responsibilities, the Commission issues licenses and permits relating to communications services and, pursuant to statute, requires antenna structures to conform to painting and lighting requirements. Section 301 of the Act requires the issuance of a license for radio communications, 47 U.S.C. 301, and construction permits from the Commission are required for certain services. *See* 47 U.S.C. 319. Section 307(b) of the Act charges the Commission with the duty to distribute broadcast licenses “among the several States and communities as to provide a

fair, efficient, and equitable distribution of radio service to each of the same.” 47 U.S.C. 307(b). Section 303(q) of the Act provides that the Commission shall have “authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.” 47 U.S.C. 303(q). Section 303(q) further provides that the “permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section.” To implement Section 303(q), the Commission has provided in its rules that the owner of any proposed or existing antenna structure that requires notice of proposed construction to the Federal Aviation Administration (FAA) must register the structure with the Commission prior to construction. 47 CFR 17.4(a). Specifically, such notification and registration is required for antenna structures that meet certain height and location criteria (generally towers more than 60.96 meters (200 feet) in height or located within certain distances of an airport, as specified in the Commission’s rules). As of June 1, 2003, approximately 92,454 antenna structures were registered with the Commission. The Commission’s rules further require that tower owners paint and light their antenna structures in accordance with the FAA’s advisory specifications for air navigation safety purposes. 47 CFR 17.6(a), 17.22, 17.23, and note preceding 47 CFR 17.45.

B. Environmental Statutes and Regulations

7. The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment, and requires federal agencies to establish procedures to identify and account for the environmental impact of projects they undertake or authorize. NEPA provides that “to the fullest extent possible * * * all agencies of the Federal Government shall * * * include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment” a detailed statement on the environmental impact of the proposed action and any adverse environmental impacts that cannot be avoided if the proposal is implemented. 42 U.S.C. 4332(2)(c). The Council on Environmental Quality’s (CEQ) regulations provide that “human environment” shall be “interpreted comprehensively to include the natural and physical environment and the

relationship of people with that environment.” 40 CFR 1508.14. NEPA also requires all Federal agencies to consult with and obtain the comments of expert Federal agencies before taking any major action significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(c).

8. The Endangered Species Act (ESA) prohibits the taking of any endangered species by any person unless authorized by FWS. 16 U.S.C. 1538(a)(1)(B). The ESA also provides that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Department of the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence” of any endangered species or threatened species or result in the “destruction or adverse modification of habitat of such species which is determined by the Secretary * * * to be critical * * *.” *Id.* § 1536(a)(2). The Migratory Bird Treaty Act (MBTA) makes it “unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill * * * any migratory bird” unless permitted by FWS. *See* 16 U.S.C. 703, 704(a). Although certain species of migratory birds are protected under the ESA, many additional species are protected under the MBTA and not the ESA.

C. The Commission’s Environmental Rules

9. The Commission has implemented subpart I of NEPA pursuant to 42 U.S.C. 4321–4335, in part 1, subpart I of its rules. *See* 47 CFR 1.1301. Under these rules, any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of an Environmental Impact Statement (EIS). 47 CFR 1.1305. Any action deemed potentially to have a significant environmental effect under categories specified in section 1.1307(a)(1) through (8) and (b) of the rules requires the preparation of an Environmental Assessment (EA). *Id.* 1.1307(a)(1) through (8), (b). In addition, the Commission will require the preparation of an EA if it is determined that a particular action, which is otherwise categorically excluded under the rules, may have a significant environmental impact. *Id.* 1.1307(c), (d). Actions that are deemed individually and cumulatively to have no significant effect on the quality of the human environment are categorically excluded from environmental processing, and do not require the preparation of an EA by